



October 17, 2002

Ms. Leah Curtis Morris
Curtis, Alexander, McCampbell & Morris, P.C.
P.O. Box 1256
Greenville, Texas 75403-1256

OR2002-5891

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170814.

The Hunt County MHMR (the "HCMHMR"), which you represent, received a request for copies of nine categories of information as follows:

- 1) policies and procedures relating to staff performance evaluations;
- 2) performance evaluations for Dr. Rick Davis since original hire date;
- 3) names of staff receiving performance evaluations for each month since January 2000;
- 4) method that the board of trustees uses to determine salaries;
- 5) criteria used to select personnel for Fall 2001 layoff;
- 6) board minutes for each meeting since January 2000;
- 7) current organizational chart;
- 8) details of notification by CEO regarding possible adverse action relating to recent litigation; and

- 9) employment application, contract, responsibilities, and salary for Kevin Stanford.

You state that HCMHMR will provide the requestor with information that is responsive to items one and four through seven of the request. You also state that HCMHMR does not maintain information that is responsive to items three or eight of the request.¹ You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code. Pursuant to section 552.305(d) of the Government Code, HCMHMR notified two third parties of HCMHMR's receipt of the request and of their right to submit arguments to this office as to why information pertaining to each of them should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). One of those parties, Dr. Rick Davis, responded to HCMHMR's section 552.305 notice and forwarded comments to our office as to why some of the requested information pertaining to Dr. Davis should not be released to the requestor. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released). We have considered all arguments and have reviewed the submitted information.

Initially, we note that portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Another category of public information under section 552.022 is "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]" Gov't Code § 552.022(a)(2). The section 552.022(a)(1) information that we have marked constitutes completed evaluations under section 552.022(a)(1). The section 552.022(a)(2) information that we have marked constitutes the salary of an employee of HCMHMR. Although HCMHMR claims that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions under the Public Information Act and, as such, do not constitute "other law" that makes

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

information confidential.² Accordingly, we conclude that HCMHMR may not withhold this section 552.022 information from disclosure under sections 552.103 and 552.107 of the Government Code. However, since the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence, we will determine whether any portion of the marked section 552.022 information is confidential under rule 503. Further, since HCMHMR also claims that portions of this information are excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code, we will address those particular claims with regard to this information. We will also address all of your claimed exceptions with regard to the remaining information that is not subject to section 552.022 of the Government Code.

We note that the Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

TEX. R. EVID. 503.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). After carefully reviewing the marked section 552.022 information, we conclude that you have failed to demonstrate that any portion of this information constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, we conclude that HCMHMR may not withhold any portion of this information from disclosure under rule 503 of the Texas Rules of Evidence.

You claim that the information that is not subject to section 552.022 is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). HCMHMR maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, HCMHMR must

demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). HCMHMR must meet both elements of this test in order for the information at issue to be excepted from disclosure under section 552.103. *See id.*

You state that the requestor has filed a lawsuit in small claims court before Justice of the Peace, Precinct 1, Place 2 related to his termination from HCMHMR, that a hearing was held on that matter on August 7, 2002, and that the requestor intends to utilize this information in his civil litigation against HCMHMR. Although we find that HCMHMR has established that litigation was pending when it received this request, we also find, however, that HCMHMR has failed to provide us with any arguments as to how any portion of the remaining information is related to this pending litigation. We also are unable to determine how this information is related to the pending litigation based on our own review of the submitted documents. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation). Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of this information under section 552.103 of the Government Code.

You also claim that the information that is not subject to section 552.022 is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). After carefully reviewing this information, we find that no portion of this information constitutes either a client confidence or an attorney's legal advice or opinion provided in furtherance of the rendition of legal services to the client. Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of this information under section 552.107(1) of the Government Code.

You claim that portions of the entirety of the information are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from

disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address HCMHMR’s section 552.101 and 552.102 claims together. We note that information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *id.* After carefully reviewing the entirety of the information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of the information at issue under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also contend that some of the information at issue should be withheld from disclosure on privacy grounds because the release of the information may place someone in a false light. We note that the false-light invasion of privacy was discussed at length in Open Records Decision No. 579 (1990). As noted in that decision, the gravamen of a false-light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Act focused on the confidentiality of information does not embrace this particular tort doctrine. We further note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Consequently, we conclude that HCMHMR may not withhold from disclosure any portion of the information at issue under false-light privacy.

You also claim that portions of the entirety of the information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. See Gov’t Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information

at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). After carefully reviewing the information at issue, we find that no portion of the information constitutes the home address, telephone number, social security number, or family member information of any official or employee of HCMHMR. Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of the information at issue under section 552.117(1) of the Government Code.

In summary, HCMHMR must release the entirety of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

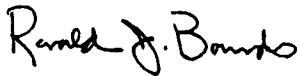
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 170747

Enc. Marked documents

cc: Mr. C. G. Galloway
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